

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

MARGARET K. WILSON,

NO. C09-1322-JCC-JPD

Plaintiff,

v.

REPORT AND
RECOMMENDATION

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

Plaintiff Margaret K. Wilson appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied her applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be REVERSED and REMANDED for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

At the time of her second administrative hearing, hearing, plaintiff was a 57 year-old woman with an Associate of Arts and Bachelor of Arts degree. Administrative Record (“AR”) at 92, 622. Her past work experience includes employment as a copy consultant/sales clerk cashier at Kinko’s; copy consultant; sales clerk/cashier, motel housekeeper, apprentice painter,

1 an electronics assembler, a nursing assistant, and a food service worker. AR at 165-202.
2 Plaintiff was last gainfully employed as a food service worker at Del Taco from August 20,
3 2004 through August 2006. AR at 205.

4 Plaintiff asserts that she is disabled due to cervical disc disease, degenerative disc
5 disease of the lumbar spine, left great toe bunion, major depressive disorder, rule out bipolar
6 disorder, social phobia, post traumatic stress disorder, and a pain disorder. AR at 18.

7 Plaintiff filed her applications for DIB and SSI on June 15 and 20, 2005, alleging an
8 onset date of disability beginning February 1, 2005. AR at 92-94, 577-79. The onset date was
9 subsequently amended by plaintiff to September 1, 2006. AR at 15, 620. The Commissioner
10 denied plaintiff's claim initially and on reconsideration. AR at 82-86, 76-80. Plaintiff
11 requested a hearing, which took place on November 20, 2007, but plaintiff failed to appear.
12 AR at 60. The claims were dismissed on December 15, 2007, based on the failure to appear.
13 An appeal to the Appeals Council was successful, because the original notice of hearing had
14 not been sent to plaintiff's attorney. AR at 25-27.

15 A second hearing was held on July 11, 2008. AR at 616-76. On September 3, 2008,
16 the ALJ issued a decision finding plaintiff not disabled and denied benefits based on a finding
17 that plaintiff could perform a specific job existing in significant numbers in the national
18 economy. AR at 15-24.

19 Plaintiff was found to be disabled as of August 29, 2008, based on a subsequent
20 application filed on December 27, 2009. Plaintiff's administrative appeal of the ALJ's
21 decision which is the subject of this suit was denied by the Appeals Council on August 28,
22 2009, AR at 8-10, making the ALJ's ruling the "final decision" of the Commissioner as that
23 term is defined by 42 U.S.C. § 405(g). Plaintiff timely filed the present action challenging the
24 Commissioner's decision. Dkt. No. 4.

II. JURISDICTION

Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

The Court may direct an award of benefits where "the record has been fully developed and further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). The Court may find that this occurs when:

- (1) the ALJ has failed to provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he considered the claimant's evidence.

Id. at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that erroneously rejected evidence may be credited when all three elements are met).

IV. EVALUATING DISABILITY

As the claimant, Ms. Wilson bears the burden of proving that she is disabled within the meaning of the Social Security Act (the “Act”). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (internal citations omitted). The Act defines disability as the “inability to engage in any substantial gainful activity” due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments are of such severity that she is unable to do her previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

The Commissioner has established a five step sequential evaluation process for determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§ 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R. §§ 404.1520(b), 416.920(b).¹ If she is, disability benefits are denied. If she is not, the Commissioner proceeds to step two. At step two, the claimant must establish that she has one or more medically severe impairments, or combination of impairments, that limit her physical or mental ability to do basic work activities. If the claimant does not have such impairments, she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe impairment, the Commissioner moves to step three to determine whether the impairment meets or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),

¹ Substantial gainful activity is work activity that is both substantial, i.e., involves significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. § 404.1572.

1 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
 2 twelve-month duration requirement is disabled. *Id.*

3 When the claimant's impairment neither meets nor equals one of the impairments listed
 4 in the regulations, the Commissioner must proceed to step four and evaluate the claimant's
 5 residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
 6 Commissioner evaluates the physical and mental demands of the claimant's past relevant work
 7 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If
 8 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is
 9 true, then the burden shifts to the Commissioner at step five to show that the claimant can
 10 perform other work that exists in significant numbers in the national economy, taking into
 11 consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§
 12 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the
 13 claimant is unable to perform other work, then the claimant is found disabled and benefits may
 14 be awarded.

15 V. DECISION BELOW

16 On September 3, 2008, the ALJ issued a decision finding the following:

- 17 1. The claimant meets the insured status requirements of the Social
 18 Security Act through March 31, 2011.
- 19 2. The claimant has not engaged in substantial gainful activity since
 20 September 1, 2006, the alleged onset date.
- 21 3. The claimant has the following severe impairments: cervical disc
 22 disease, degenerative disc disease of the lumber [sic] spine, left great
 23 toe bunion, major depressive disorder, rule out bipolar disorder, social
 24 phobia, post traumatic stress disorder, and a pain disorder.
- 25 4. The claimant does not have an impairment or combination of
 26 impairments that meets with or medically equals one of the listed
 impairments in 20 CFR Part 404, Subpart P, Appendix 1.
5. After careful consideration of the entire record, I find that the claimant
 has the residual functional capacity to perform light work as defined in

20 CFR 404.1567(b) and 416.967(b) except she can perform postural activities occasionally and she can balance frequently. She can never climb ladders, ropes or scaffolds. She can reach overhead occasionally. She can adequately perform the mental activities generally required by competitive, remunerative unskilled work as follows: she can understand, remember and carry out simple instructions compatible with unskilled work; she would have average ability to perform sustained work activities (i.e., can maintain regular attention and concentration; persistence and pace) in an ordinary work setting on a regular and continuing basis (8 hours a day, for 5 days a week or an equivalent schedule) within customary tolerances of employer rules regarding sick leave and absence; she can make judgments commensurate with the functions of unskilled work, i.e., simple, work-related decisions; she can respond appropriately to supervision, co-workers and work situations; and she can deal with changes, all within a routine work setting. She cannot deal with the general public as in a sales position; incidental contact with the general public would not be precluded.

6. The claimant is capable of performing past relevant work as a photocopy machine operator and electronics assembler. This work does not require the performance of work-related activities precluded by the claimant's residual functional capacity.

7. The claimant has not been under a disability, as defined in the Social Security Act, from September 1, 2006 through the date of this decision.

AR at 17-23.

VI. ISSUE ON APPEAL

The principal issue on appeal is whether the ALJ erred in determining that plaintiff was capable of performing work at a light level of physical exertion rather than a sedentary exertional level, and the concomitant RFC at Step 4, consistent with this determination. This requires consideration of whether the ALJ properly considered and evaluated the opinions of plaintiff's medical providers.²

² In her opening brief, plaintiff asserted as a separate error at Step 4 the issue of whether there were sufficient jobs in the national economy. In her reply brief, she withdrew this argument, and reiterated the issue was whether the RFC was properly determined. Dkt. 28 at 10.

VII. DISCUSSION

An RFC is the “maximum degree to which [a plaintiff] retains the capacity for sustained performance of the physical-mental requirements of jobs.” 20 C.F.R. 404, Subpt. P, App. 2 §200(c). It is an administrative decision as to the most a plaintiff can do, despite her limitations. SSR 96-8p. The ALJ must assess all of the relevant evidence, including evidence regarding symptoms that are not severe, to determine if the claimant retains the ability to work on a “regular and continuing basis,” *e.g.*, eight hours a day, five days a week. *Reddick*, 157 F.3d at 724; *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995); SSR 96-8p.

Here, the ALJ determined that plaintiff had the RFC “to perform light work as defined in 20 CFR 404.1567(b) and 416.967(b) except she can perform postural activities occasionally and she can balance frequently. She can never climb ladders, ropes or scaffolds. She can reach overhead occasionally. She can adequately perform the mental activities generally required by competitive, remunerative unskilled work as follows: she can understand, remember and carry out simple instructions compatible with unskilled work; she would have average ability to perform sustained work activities (i.e., can maintain regular attention and concentration; persistence and pace) in an ordinary work setting on a regular and continuing basis (8 hours a day, for 5 days a week or an equivalent schedule) within customary tolerances of employer rules regarding sick leave and absence; she can make judgments commensurate with the functions of unskilled work, i.e., simple, work-related decisions; she can respond appropriately to supervision, co-workers and work situations; and she can deal with changes, all within a routine work setting. She cannot deal with the general public as in a sales position; incidental contact with the general public would not be precluded.” AR at 20. Plaintiff argues this overstates her RFC, in that her physical limitations dictated no more than a sedentary exertional level of work and the ALJ reached the conclusion she could work up to a “light”

1 level of work only by misinterpretation and ignoring the medical evidence and then
2 misapplying the required medical hierarchy of medical evidence.

3 A. Standard of Review for Medical Evidence

4 As a matter of law, more weight is given to a treating physician's opinion than to that
5 of a non-treating physician because a treating physician "is employed to cure and has a greater
6 opportunity to know and observe the patient as an individual." *Magallanes v. Bowen*, 881 F.2d
7 747, 751 (9th Cir. 1989); *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating
8 physician's opinion, however, is not necessarily conclusive as to either a physical condition or
9 the ultimate issue of disability, and can be rejected, whether or not that opinion is contradicted.
10 *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining
11 physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not
12 contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*,
13 157 F.3d 715, 725 (9th Cir. 1988). "This can be done by setting out a detailed and thorough
14 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
15 making findings." *Id.* (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than
16 merely state his conclusions. "He must set forth his own interpretations and explain why they,
17 rather than the doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th
18 Cir. 1988)). Such conclusions must at all times be supported by substantial evidence. *Reddick*,
19 157 F.3d at 725.

20 The opinions of examining physicians are to be given more weight than non-examining
21 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Like treating physicians, the
22 uncontradicted opinions of examining physicians may not be rejected without clear and
23 convincing evidence. *Id.* An ALJ may reject the uncontroverted opinions of an examining
24 physician only by providing specific and legitimate reasons that are supported by the record.
25 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

1 Plaintiff argues that the ALJ erred in his assessment of the opinions of Drs. Michael
2 Carraher, Jim Johnson, and Mark Heilbrunn and the opinion of treating physician's assistant
3 Denise Plaisier. Plaintiff also argues that the ALJ erred by giving greater weight to a non-
4 examining DDS physician than to the opinions of the examining and treating providers.

5 Opinions from non-examining medical sources are to be given less weight than treating
6 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the
7 opinions from such sources and may not simply ignore them. In other words, an ALJ must
8 evaluate the opinion of a non-examining source and explain the weight given to it. SSR 96-6p.
9 Although an ALJ generally gives more weight to an examining doctor's opinion than to a non-
10 examining doctor's opinion, a non-examining doctor's opinion may nonetheless constitute
11 substantial evidence if it is consistent with other independent evidence in the record. *Thomas*
12 *v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Orn*, 495 F.3d at 632-33.

13 *I. Dr. Michael Carraher*

14 Dr. Carraher is an examining physician who saw plaintiff for the Idaho Disability
15 Determinations Service ("DDS") in October 2005. AR at 403-05. Dr. Carraher noted that
16 plaintiff had "moderate to severe degenerative disc disease at L3-L4 with levoscoliosis." AR
17 at 403. He concluded she has physical impairments of probable osteoarthritis of the cervical
18 spine, degenerative changes of the lumbar spine, limited range of motion of the left shoulder
19 with possible rotator cuff tear, knee pain. AR at 405. He concluded that she should be
20 restricted to light-duty and "not have to do any prolonged standing." *Id.*

21 Plaintiff argues that the RFC failed to take into account the prolonged standing
22 restrictions mentioned by Dr. Carraher. Dkt. No. 18 at 8. This is true. Moreover, the RFC
23 determined by the ALJ directly contravenes the prolonged standing limitations directed by Dr.
24 Carraher. When the ALJ posed a hypothetical to the vocational expert ("VE"), he asked the
25 VE to assume that plaintiff could "stand and/or walk with normal breaks for a total of about six
26 hours in an eight-hour workday." AR at 663. The Commissioner claims that this evidence was

1 neither significant nor probative, and therefore the ALJ was not required to explain his
2 decision not to accept the limitation. Dkt. No. 26 at 11. The Commissioner contends that the
3 probative value is diminished because the evaluation took place before her amended alleged
4 onset date and she continued her employment for eleven months thereafter, only quitting her
5 job to move to Washington. The Commissioner also argues that Dr. Carraher did not discuss
6 what led to his conclusion.

7 The record is silent on why the ALJ ignored Dr. Carraher's prolonged standing
8 limitations. Perhaps it was for the reasons urged by the Commissioner. However, the ALJ did
9 not provide these as the reasons. It is just as probable that the ALJ overlooked these
10 restrictions. In any event, the ALJ erred by reaching the conclusion that plaintiff could
11 perform at a light exertional level of work while ignoring Dr. Carraher's opinion that plaintiff
12 be restricted from prolonged standing.

13 2. *Jim Johnson, M.D.*

14 In May 2006, plaintiff was seen by Dr. Johnson, after a workplace injury. AR at 437-
15 40. Dr. Johnson restricted her to lifting 10 pounds maximum, on an occasional basis, with no
16 above-shoulder lifting, and restricted her further to no more than 10 pounds maximum of
17 pushing or pulling on an occasional basis. *Id.* The ALJ ignored the report of Dr. Johnson.

18 The Commissioner argues that because this occurred before her amended alleged onset
19 date, and because plaintiff was subsequently released to work, Dr. Johnson's reports are not
20 probative to the time period at issue. Dkt. No. 26 at 12.

21 The amended alleged onset date began on September 1, 2006 (AR at 15, 620). As
22 discussed above, Ms. Wilson was found disabled due to a second application, effective August
23 29, 2008. AR at 9. Thus, the time period at issue in this case is from September 1, 2006
24 through August 28, 2008. Moreover, the issue before the Court is not resolved by a
25 determination that plaintiff was released to work. The question is not whether the plaintiff was
26 completely unable to work as of that date. The issue, instead, is whether the plaintiff's RFC

1 was determined properly when the ALJ concluded that she had the ability to work at a “light”
2 exertional level, rather than, as alleged by plaintiff, only a “sedentary” work level. Dr. Johnson
3 saw the plaintiff four months before her amended alleged onset date, and limited her to a less-
4 than-light level of exertional activity. On August 2, 2006, R. Maxwell, D.O. examined her, but
5 also assessed the same lifting and pushing and pulling restrictions. AR at 430A. This was less
6 than one month before her alleged amended onset date. Five days later, plaintiff reported to J.
7 Royce Ely, A.R.N.P. that she was still having severe back pain as a result of her work injury
8 and was unable to sleep at night. AR at 548. The ALJ did not consider any of these reports
9 when making his RFC determination. All of them are relevant and probative to the issue
10 involving the plaintiff’s RFC.

11 Finally, the failure of the ALJ to consider the opinions cannot be excused as non-
12 probative simply because they predated the alleged amended onset date. Here, they were very
13 close to the onset date. Moreover, the ALJ cannot simply cherry-pick evidence. To support
14 his RFC determination, he cited a number of reports that substantially predated the amended
15 onset date. *See e.g.*, AR at 318-25, 326. This does not mean that the ALJ has to give the
16 reports of Drs. Johnson and Maxwell and Nurse Ely controlling weight. It does mean,
17 however, that their opinions cannot simply be ignored as non-probative when other medical
18 reports even earlier in time than these are used, in part, to support the “light” exertional level.

19 3. *Denise Plaisier, PA-C*

20 Ms. Plaisier is a physician’s assistant who saw plaintiff and issued an opinion dated
21 January 2008, limiting plaintiff to sedentary work, based on a diagnosis of arthropathy of the
22 neck, shoulder, back and pelvis. AR at 480-85. The ALJ dismissed her opinions, stating “Ms.
23 Plaisier noted multiple health concerns ‘all of which could not be addressed today.’ I discount
24 the limitation to sedentary work as it was not based on a full evaluation. With appropriate
25 orthotics, the claimant is not limited to sedentary work.” AR at 23.
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1 The Commissioner argues that as a physician's assistant, Ms. Plaisier is not an
2 acceptable medical source. 20 C.F.R. §§404.1513(d); 416.913(d); Social Security Ruling
3 ("SSR") 06-03. Nevertheless, the Commissioner also concedes that her opinions may be given
4 "some weight" depending on the facts of the case. SSR 06-03p.

5 The Commissioner asserts that the ALJ "properly considered Ms. Plaisier's opinion
6 regarding plaintiff's limitations and accepted it to the degree it was consistent with plaintiff's
7 credible complaints." Dkt. No. 26 at 13. Actually, the ALJ did nothing of the sort. The ALJ
8 rejected ("discounted") the opinion, and provided two reasons to justify the decision: (1) that it
9 was not based on a "full evaluation," and (2) that proper use of orthotics would raise plaintiff's
10 exertional level.

11 The ALJ erred in his treatment of Ms. Plaisier's opinion. First, Ms. Plaisier noted "she
12 has multiple health concerns, all of which could not be addressed today." AR at 483 (emphasis
13 in original). The fact that Ms. Plaisier was unable to address all of plaintiff's multiple health
14 concerns does not provide a valid basis to reject those findings as to which Ms. Plaisier offered
15 an opinion, particularly when the opinion is supported by an accompanying incapacity range of
16 joint motion examination, as was true in this case. AR at 484-85. In other words, the fact that
17 Ms. Plaisier, for example, was unable to address plaintiff's headaches or irritable bowel
18 syndrome (AR at 480) has no effect on the validity of the opinion she expressed on plaintiff's
19 shoulder, back, pelvis and neck limitations when she found plaintiff to be restricted to a
20 sedentary exertional level.

21 The other basis proffered by the ALJ to reject Ms. Plaisier's opinion was the ALJ's
22 opinion that proper orthotics would raise her exertional level to being capable of handling light
23 work. There is no medical support for this statement. The only apparent reference to orthotic
24 support comes from a report from Steve Segall. AR at 461-68. However, Mr. Segall is not an
25 acceptable medical source. He offers a lay opinion, but there is nothing in the record to
26 support his conclusion. The Commissioner (but neither the ALJ nor Mr. Segall) point to AR

1 488 and 510 to prop up Mr. Segall's rather bold assertion. However, AR 510 is dated June
2 2008, approximately 2 months after Mr. Segall's report, and it simply states that plaintiff has
3 been casted for orthotics. AR 488 is a report dated approximately 2 months prior to Mr.
4 Segall's report, and it only says that "She is here today for follow up on low back and left hip
5 pain. This has become a little bit worse since I last saw her or at least it has been persistent.
6 This has been a *chronic problem* for her. She says that her left leg is shorter than her right leg.
7 She is supposed to be wearing an orthotic in her left shoe but she lost it. She says it is
8 throwing her pelvis out of whack. On evaluation from a couple of weeks ago, she showed
9 marked limitations in range of motion and very tense tight muscles." AR at 488. (emphasis
10 added)

11 This is not substantial evidence, by itself, from which an ALJ can properly deduce that
12 use of orthotics would elevate the plaintiff's exertional level to light work from sedentary
13 work. This is particularly true in light of the evidence tendered by Dr. Carraher, an acceptable
14 medical source and ignored by the ALJ that plaintiff should not engage in any "prolonged
15 standing." AR at 663. To do so would contravene the *Orn* medical hierarchy outlined above.
16 Finally, it is possible that Mr. Segall may have taken liberties with the report of Dr. Ashley
17 who reported "that "radiographs cervical spine show degenerative intervertebral disc changes."
18 Mr. Segall decided to report that Dr. Ashley's report showed "mild degenerative intervertebral
19 disc changes." AR at 468. This is an issue for the ALJ to determine on remand.

20 The ALJ rejected Ms. Plaisier's opinions for reasons that do not withstand scrutiny.

21 4. *Mark Heilbrunn, M.D.*

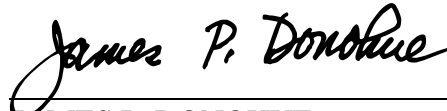
22 Plaintiff also argues that the disability evaluation of Dr. Heilbrunn performed on March
23 3, 2009 AR at 607-12 and submitted to the Appeals Council mandates a finding that plaintiff
24 could not perform at a light exertional level. The Commissioner asserts that because this is
25 after the time frame in question, it is not material. The report by Dr. Heilbrunn would seem to
26 confirm the opinions of Ms. Plaisier. However, this decision is properly left to the ALJ.

1 Because this matter is being remanded for further proceedings, the ALJ should have the first
2 opportunity to determine its relevance to the time period in question.

3 VIII. CONCLUSION

4 For the foregoing reasons, the Court recommends that this case be REVERSED and
5 REMANDED to the Commissioner for further proceedings not inconsistent with the Court's
6 instructions. A proposed order accompanies this Report and Recommendation.

7 DATED this 2nd day of June, 2010.

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10 JAMES P. DONOHUE
11 United States Magistrate Judge
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